

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2005AP723-CR
2005AP724-CR**

**Cir. Ct. No. 1996CF241
1996CF2329**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTOFFER A. ASHMORE A/K/A TRAVIS A. ASHMORE,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kristoffer Ashmore appeals an order denying his motion to modify sentences imposed in 1997. Because the issues he raised in the

motion are either procedurally barred or do not constitute “new factors,” we affirm the order.

¶2 In 1997, Ashmore was convicted of six counts of sexual assault of children, four counts of exposing children to harmful material and one count of intimidating a victim. The court imposed the maximum consecutive sentences totaling seventy-three years in prison. In 1998, Ashmore filed a postconviction motion seeking a new trial. The trial court denied the motion and this court affirmed the convictions on appeal. Ashmore then filed the present motion arguing (1) the length of his sentence bars him from sex offender treatment until 2039, making the lengthy sentence cruel and unusual punishment; (2) the existence of WIS. STAT. ch. 980 rendered moot the need to protect the public; (3) the sentencing court misunderstood the period Ashmore would have to serve in prison before he became eligible for parole; (4) the sentence is excessive when compared with the sentences imposed for similar crimes; (5) Ashmore has shown an ability to rehabilitate himself by completion of an anger management program and vocational rehabilitation; and (6) the imposition of consecutive sentences for one continuous course of conduct is impermissible. The trial court denied the motion and Ashmore appeals.

¶3 A defendant may not file more than one postconviction motion unless he establishes sufficient reason for filing the second motion. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ashmore’s motion does not establish any reason for his failure to raise most of these issues in his initial postconviction motion. Therefore, they are procedurally barred.

¶4 The only exception is any new factor that did not exist at the time of his initial postconviction motion. A new factor is a fact or set of facts highly

relevant to the imposition of sentence, but not known to the sentencing judge at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. See *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). It must be an event or development that frustrates the purpose of the original sentence. *State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (Ct. App. 1989). Whether a fact is a new factor is a question of law that we review without deference to the trial court. *State v. Champion*, 2002 WI App 267, ¶4, 258 Wis. 2d 781, 654 N.W.2d 242.

¶5 Ashmore's motion does not establish any new factor that could justify a sentence reduction. Ashmore's eligibility and the timing of sex offender treatment were not factors that influenced the sentencing decision. The sentencing court made clear that it imposed the maximum possible sentence to punish Ashmore and to protect children by incapacitating him. Ashmore's inability to receive sex offender treatment in prison does not frustrate the purpose of the sentences.

¶6 The possibility of using WIS. STAT. ch. 980 (2003-04) sexual predator commitment rather than a lengthy sentence to incapacitate Ashmore is not a new factor. The sentencing court considered and rejected that argument. It is not a factor unknown to the court at the time of sentencing.

¶7 Ashmore's eligibility for parole is not a new factor. In addition to numerous factual errors regarding parole eligibility, the motion does not establish that any development regarding parole would frustrate the purpose of the original sentence. The sentencing court stated its intention that Ashmore remained incarcerated for as long as possible.

¶8 Likewise, any rehabilitative progress does not constitute a new factor. *See State v. Ambrose*, 181 Wis. 2d 234, 240, 510 N.W.2d 758 (Ct. App. 1993). While the sentencing court expressed doubt that Ashmore could be rehabilitated, rehabilitation was not the purpose of the sentence it imposed. Completion of anger management and vocational training does not frustrate the sentencing court's expressed intention of punishing Ashmore and protecting children.

¶9 All of Ashmore's remaining arguments could have been raised in his initial postconviction motion, and he has not established sufficient reason for his failure to raise them at that time. Therefore, they will not be addressed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

